In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1085

MORRIS ZUDICK and ANTHONY DE GROSA, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. 1a-8a) are not officially reported.

JURISDICTION

The judgments of the court of appeals were entered on January 6, 1969. (Pet. 9a-10a.) The petition for a writ of certiorari was filed on February 25, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Fourth Amendment prohibits enforcement of a summons issued by a special agent of the Internal Revenue Service requiring an officer of a corporation to produce corporate records for determination of the tax liabilities of the corporation and the officer.

STATUTES INVOLVED

Internal Revenue Code of 1954:

> SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.
>
> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the

summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

[26 U.S.C. 7602.]

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) *Jurisdiction of district court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

* * * *

[26 U.S.C. 7604.]

STATEMENT

The petition seeks review of decisions in two unrelated but similar actions brought by the United States to enforce Internal Revenue summonses issued by special agents. The summonses directed petitioners, as officers of their respective corporations, to produce specified corporate records relating to the tax liabilities of the corporations and, in the case of petitioner Zudick, to his individual income tax liabilities. The government's petition for enforcement in each case was supported by an affidavit of the special agent

alleging that it was necessary to inspect the corporate records in order to ascertain the tax liabilities under investigation. (Z. App. 11a-18a; DeG. App. 20a-27a.)[1] In each case, petitioner appeared before the special agent but refused to produce the corporate records unless the government committed itself to use the records solely for civil tax purposes. (Z. App. 6a-7a; DeG. App. 11a.) After a hearing in each action, the district court issued orders requiring petitioners to produce the corporate records called for. (Z. App. 18a; DeG. App. 28a.) The order of enforcement in each case was affirmed by the court of appeals. (Pet. 9a-10a.)

ARGUMENT

In *Justice* v. *United States*, 390 U.S. 199, this Court affirmed summarily the judgment of a three judge court which had held that the statutory procedure for issuing and enforcing an Internal Revenue summons did not contravene the Fourth and Fifth Amendments even though information might thereby be obtained for subsequent use in a criminal proceeding (*United States* v. *First National Bank of Pikeville*, 274 F. Supp. 283 (E.D. Ky.). And in *United States* v. *Powell*, 379 U.S. 48, 52-57, this Court held a showing of probable cause in the technical sense unnecessary for judicial enforcement of a summons to investigate suspected tax fraud. Thus, there is no merit to petitioners'

[1] Record references herein are to the appendices filed in the court of appeals. "DeG. App." and "Z. App." are references to the appendices filed in the court of appeals by petitioners DeGrosa and Zudick, respectively.

argument that the statutory procedure may not be used where, as in these cases, the investigation of tax liability may result not only in determination of civil liabilities, but in an administrative recommendation that the corporate officer be prosecuted for criminal offenses relating to the tax liabilities.[2]

The fact that petitioner DeGrosa "is the subject of a criminal investigation by the Internal Revenue Service" (Pet. 7) adds nothing to his position. As the court of appeals noted (Pet. 2a-3a, fn. 4) even though "criminal prosecution is on the horizon * * *", it is not possible to contend that the investigation lacks a civil purpose. Furthermore, a corporate officer has no privilege to refuse to produce corporate records which may implicate him in criminal offenses. *United States* v. *White*, 322 U.S. 694, 699.

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[2] Petitioners urge that under Section 1118.6 (Pet 4) of the Statement of Organization and Functions, 32 Fed. Reg. 727, 760, the special agent's function is purely criminal. But Section 1114.(10) of the Statement, 32 Fed. Reg. 727, 754, makes it clear that the special agent's duties are not so narrowly constricted. The functions of the Intelligence Division are stated to include "the investigation of alleged tax fraud, certain other civil and alleged criminal violations of tax laws * * * and such other special investigations as the Commissioner may direct."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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